UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

AMICUS CURIAE BRIEF FOR THE STATES OF COLORADO, OREGON, NEVADA, IDAHO, MONTANA AND ALASKA IN SUPPORT OF THE RESPECT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

DUKE W. DUNBAR,
Attorney General
State of Colorado

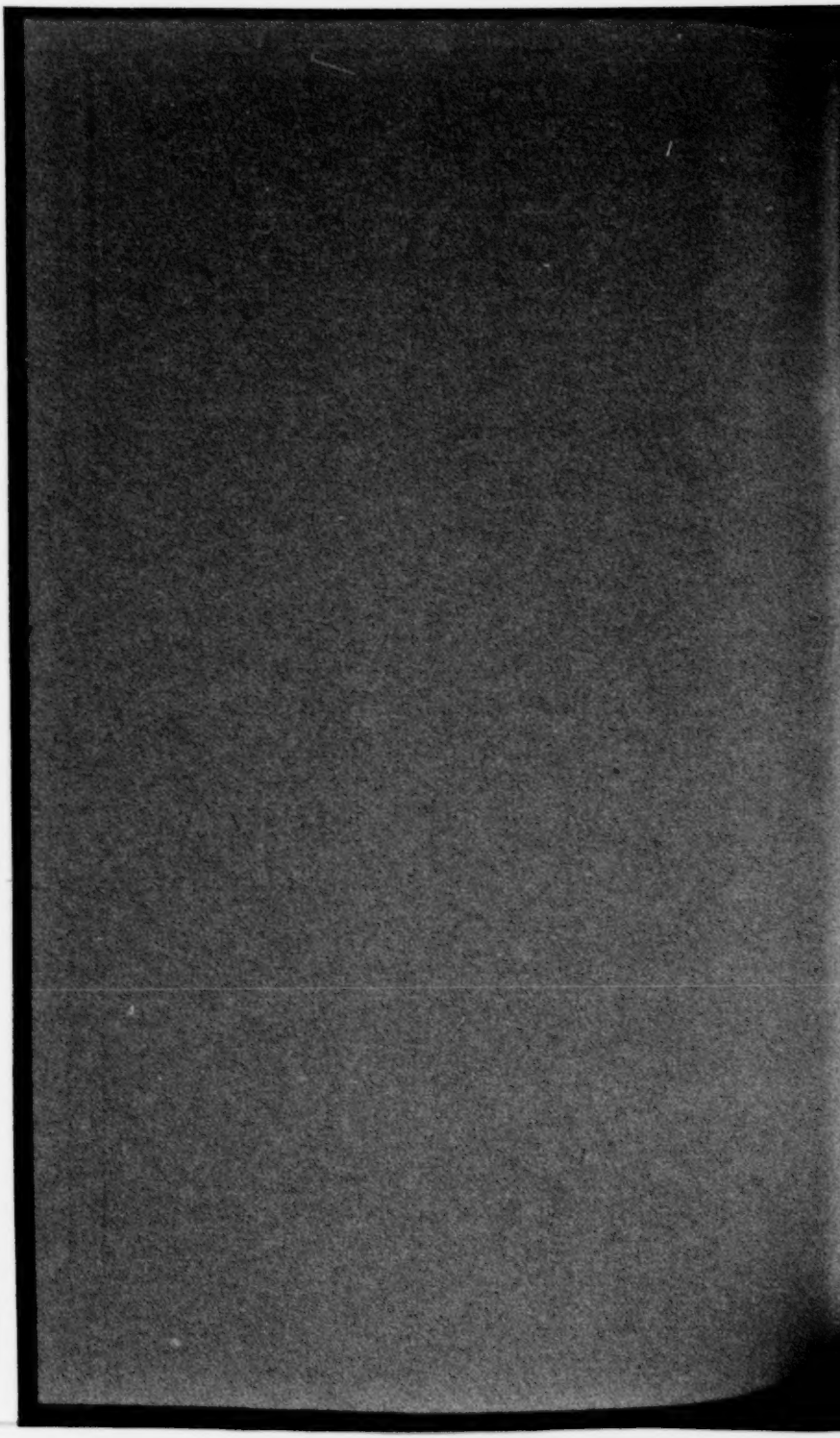
ROBERT M. ROBSON,
Attorney General
State of Idaho

LEE JOHNSON,
Attorney General
State of Oregon

ROBERT L. WOODAHL,
Attorney General
State of Montana

HARVEY DICKERSON,
Attorney General
State of Nevada

G. KERR RENNER,
Attorney General
State of Alaska



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In the Supreme Court of the United States

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No. 1178

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STATEMENT OF INTEREST

The aridity of climate and scarcity of water have always been limitations upon development of the West. In most areas, there just is not enough water to satisfy all of the demands. As the West grows and develops, the demands are continually expanding. Unfortunately, the available water supply remains fixed. Hence, the competition for water continually increases.

The true value of water is not measured by its physical possession. Its value is based upon the expectancy that a like amount will be available at a particular place, year after year. It was this desire for a stable

expectancy that led to the "first come, first served," or appropriative doctrine of water rights.

The appropriative doctrine, in one form or another, is followed in all nineteen Western States, including Alaska and Hawaii. Under it, a right to the use of water is initiated by an expression of desire, in proper form, of utilizing a given amount of water. This must be followed by a diligent effort leading to the actual beneficial use of the water. Priority of right dates from the initial expression of desire for use. In cases of insufficient water to supply all rights, those rights with the latest date of priority are denied water until all senior rights have been satisfied.

Various federal agencies have claimed that the reservation of land for various purposes also reserved sufficient water necessary to effectuate the purpose of the Reservation. The acceptance of such a theory of claims by the federal agencies would, on a fully utilized stream, create a situation wherein increased federal uses would deny water to users who had water rights with priorities established after the Reservation, but prior to the expanded use.

In the eleven Western States, the United States owns 45.7 percent of the land. Of a total area of approximately 760,000,000 acres, the United States owns some 350,000,000 acres. Included in that 350,000,000 acres are approximately 160,000,000 which were reserved between 1897 and 1903 for National Forest purposes. These are the high mountain lands that receive and

collect the winter snows for summer release. Runoff from these lands averages 200 million acre feet annually, or approximately 55 percent of the average annual runoff.[1]

According to the same study, federal consumptive uses in 1967 in the eleven Western States totalled 2,255,836 acre feet. By 1980, those agencies estimate their consumptive use to increase to 2,472,269 acre feet. Their projected consumptive uses for the year 2000 would total 2,619,474 acre feet.[2]

Thus, according to their own conservative estimates, federal uses will increase approximately sixteen percent by the year 2000 in a region that is already notoriously water deficient. Such increases, if concentrated in already water short areas, could be disastrous to water users who had long been using that water, and had made vast developmental expenditures based upon a supply that did not include the expanded federal uses.

The States do not wish to deprive the Federal Government of valuable water rights. They know only too well that related land resources are much less valuable without the water necessary for their development. The States ask only an identification of the extent of the federal rights, so that existing uses might be protected and future developers, whether federal, state

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[1] Wheatley, Corker, et al, 1 Study of the Development, Management and Use of Water Resources on the Public Lands. S-30 (1969)

[2] Id at 475, v II. See Appendix A.

or private, might better be able to predict the water supply available for further development.

The United States asserts that "43 U.S.C. does not consent to adjudications of the reserved water rights of the United States." To accept this theory would allow expansion of federal water uses from dwindling water supply at the expense of long-established water rights. Such a theory would subject the billions of dollars invested in water resource development in the Western States to the whim of federal administrators and transfer the future planning and development of western water resources completely out of the state and private sectors and into the Federal Government. It is to this single issue that the signatory states direct this Brief.[3]

Whether or not Water District 37 constitutes a "river system" as defined by 43 U.S.C. 666 is beyond the scope of this Brief.

Determination of the existence, nonexistence or the extent of "reserved rights" is not properly before this Court at this time. Determination of that issue should only come after the jurisdictional question has been answered and the Colorado Court has been allowed to adjudicate the Eagle River System. Then, and only then, is the proper time for this Court to review the validity of the Colorado Court's decision concerning the Reservation Rights.

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[3] See Appendix B for a compilation of state policy statements on the issue of the McCarran Amendment and state-federal relations in general.

QUESTION PRESENTED

Whether the United States, by reliance upon the anachronistic defense of sovereign immunity, should be allowed to avoid the identification of its claims to the use of water from reserved lands needed for the protection of existing rights and the establishment of the stability necessary for meaningful future planning of water resource development.

SUMMARY OF ARGUMENT

I

The United States should not be permitted by reliance upon the anachronistic doctrine of sovereign immunity to frustrate effective water rights adjudications. A vestige of the ancient fiction that a King can do no wrong, this doctrine has long been castigated by commentators and, more recently, has been rejected by the courts. It has no rational, moral or practical underpinnings which would justify its retention as a bar to proper determinations of water rights. Since the doctrine was judicially created, it can and should be repudiated by this Court.

II

The economic health of the arid and semi-arid West is crucially tied to the available water supply. Since there is not sufficient water to satisfy all demands, it is imperative that rights to water be determined and allocated in an orderly way. This can be accomplished only by means of proceedings adjudicating the rights

of *all* claimants to a single water source. Prior to the passage of the McCarran Amendment, effective determination of water rights was impossible because the United States refused adjudication of its rights. Federal water rights thus remained uncatalogued, leaving individual water rights intolerably confused and unstable. The McCarran Amendment, by authorizing joinder of the United States in adjudication procedures, was enacted to eliminate this evil.

Surprisingly, the government now urges this Court to construe the Amendment to preclude the adjudication of federal reserved water rights, thereby perpetuating the very instability the Act was designed to eliminate. Accordingly, this Court should reject this construction and interpret the Amendment so as to effectuate its purpose by allowing adjudication of all U.S. water rights. This can be accomplished by according the phrase "the owner of" general application or by refusing to delimit the scope of the phrase "or otherwise" to water rights acquired under state appropriation laws.

III

Much of the wealth of the Western United States has been built upon the stable foundation of a firm water supply obtainable under the appropriative doctrine of water rights. The states do not wish to take away precious water rights from the United States but rather to identify the extent and priorities of such rights, thus bringing stability into actual and antici-

pated water usage and development. They should be given the opportunity to try.

ARGUMENT

I

The United States Should Not Be Allowed, By Reliance Upon an Anachronistic Defense, to Frustrate Legitimate Adjudication Procedures.

The United States asserts that it can be joined as a party in the instant action only if the McCarran Amendment has explicitly waived the doctrine of sovereign immunity. That doctrine is an indefensible anachronism which has no logical, moral, or practical underpinning which would justify its continued retention in the area of water rights determination. Sovereign immunity harkens back to the days of monarchial privilege and the ancient fiction that the King could do no wrong. The doctrine's origin in this country cannot be found in the Constitution, in an interpretation of the Constitution, nor in any specific enactment of Congress. It is unquestionably judge-made. In one curious sense, the law of sovereign immunity was found and not made, for it developed not through conscious judicial creation, but through judicial assumption that it already existed.

In 1793, this Court explicitly left open the question of whether or not the government could be sued without its consent.[1] Nonetheless, the doctrine gradually developed into the case law. In 1882, this Court acknowledged that it had not directly considered the

[1] *Chisholm v. State of Georgia*, 2 U.S. (2 Dall.) 419, 461, 478 (1793)

principle of sovereign immunity and that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."[2]

The judges who created and molded the doctrine were often actuated by misunderstanding. Perhaps the outstanding example of a mistake was the unanimous pronouncement of this Court in 1868 that: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents."[3] One eminent commentator has pointed out that the Court "overlooked the fact that practically every country of western Europe had long admitted such liability."[4]

Closer to the heart of the probable motivating reasons for the development of sovereign immunity is the misunderstanding exemplified by another statement of this Court in 1868: "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."[5] Not only is this proposition not obvious,

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[2] *United States v. Lee*, 106 U.S. 196, 207, 1 S. Ct. 240, 250, 27 L.Ed. 171 (1882).

[3] *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274, 19 L.Ed. 453 (1868)

[4] Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 2 (1934).

[5] *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868).

but the opposite of this proposition is rapidly becoming obvious.

Noted commentators, after tracing the development of the doctrine in American law, have lamented:

> Monarchial doctrines of Kings who can do no wrong and sovereigns above the law were developed and inflated in the United States to a point never reached in England, in which they had their roots, and never even deemed worthy of serious consideration in the feudal continent so often and so erroneously deemed the source of governmental irresponsibility. It was left for the democratic United States to furnish the rationalizations and unconvincing explanations which gave a misunderstood major premise the false appearance of a reasoned and logical conclusion.
>
> But however unjustified the premise of sovereign irresponsibility, it has stood rather stubbornly, even if not impregnably, in the way of statutory reform designed to overcome the injustice of these superannuated judicial doctrines.[6]
>
> Within a political and social system such as exists in the United States, one would think that the touchstone for the legal relationship between the citizen and the state would not be that expressed by the term "sovereign immunity" but rather a generous theory of "public responsibility." . . . [S]overeign immunity means much more; its connotation is that of extensive public irresponsibility. Any theoretical support for the doctrine

[6] Borchard, *State and Municipal Liability in Tort — Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934).

> of sovereign immunity, in the broad sense of the term, has long ago been discarded; but the doctrine itself remains a stumbling block. Writing in 1959, one critic observed that "roots stretching out from ancient times have tripped twentieth century courts in their efforts to reach practical solutions needed in an age where state activities dominate society. . . . . Timid legislators, weaving psychological straight-jackets have, except in haphazard instances, been similarly unwilling to act.[7]
>
> Thomas Jefferson said it better than anyone: "The care of human life and happiness is the first and only legitimate object of good government." Against such a standard, sovereign immunity has been and is a shibboleth that ought to be eliminated from legal and political vocabulary.[8]

The trend today is definitely away from sovereign immunity and towards sovereign responsibility. Although there have been legislative inroads into sovereign immunity [e.g., The Federal Tort Claims Act, the McCarran Amendment under consideration here], the most recent inroads have been made by the courts. Recognizing that the doctrine was judicially created, courageous courts have acted to abolish large chunks of immunity. This trend has gained considerable momentum since 1957, particularly in the area of government liability for tort. The states in which judicial action has been taken to eliminate large areas of im-

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[7] McCord, *Sovereign Immunity and Public Responsibility*, University of Illinois Law Forum (Winter 1966) p. 793.

[8] Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, University of Illinois Law Forum (Winter 1966) p. 828.

munity, although some have waivered, are, chronologically, Florida, Colorado, Illinois, New Jersey, California, Michigan, Wisconsin, Minnesota, Arizona, Nevada, and Washington. In addition, the District of Columbia has also abolished the immunity. While the specific holdings of these cases are not relevant to the case at bar, the pervasive judicial distaste for and repudiation of sovereign immunity is. Many of these cases are collected in Appendix C and highlight three major points: (1) The doctrine of sovereign immunity is an anachronism without rational or moral justification; (2) The doctrine was introduced into American jurisprudence by the courts; and (3) Therefore, the courts can and should eliminate the doctrine.

Although this Court continues to give lip service to the doctrine of sovereign immunity by using it as grounds for dismissal of actions against the United States, in many cases it has effectively, if not formally, rejected the doctrine and sustained jurisdiction. In order to do so, the Court has had to indulge in a fiction — i.e., that a suit against a governmental officer is not a suit against the government (even though all concerned are fully aware that it is). Confusion has often developed because the Court has sometimes dismissed a suit against the government officer because it was really a suit against the government, and sometimes allowed the suit on the fiction that the suit is against the officer. This confusion has produced a series of Supreme Court decisions which this Court acknowledges to be difficult to reconcile.[9]

[9] *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947).

In 1963, this Court decided two companion cases arising out of the water problems of California's Central Valley — *Dugan v. Rank*[10] and *City of Fresno v. California*.[11] The *Dugan* suit was an injunction against local officials of the United States and against the United States to prevent diversion of water. The Court held that the United States had not given consent to the suit and that the action against the officers was against the United States. Diversion of the water was not a trespass but "a partial taking of respondent's claimed rights." Since the statute authorized that acquisition by "eminent domain or otherwise," the water rights of the plaintiffs were "subject to seizure."

This Court rejected the claim that the McCarran Act authorized joinder of the United States because the proceedings were not a "general adjudication of water rights." Thus construed under the *Dugan* opinion, sovereign immunity prevents owners from enjoining government officers from taking their property if the officers are (1) acting within their statutory authority and (2) their action is constitutional. This Court also held that (1) the statute authorized the fiscal seizure of the property rights in the water and (2) such seizure is constitutional so long as the Tucker Act allows a suit for damages.

The *Fresno* case was brought by the City against the State, local officers of the United States and the United States. The suit differed from the *Dugan* suit in that a declaration as well as an injunction was sought. The Court held that the opinion in *Dugan* controlled the

[10] 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963)
[11] 372 U.S. 627, 83 S. Ct. 996, 10 L.Ed. 2d 28 (1963)

decision. The Court had stated in *Dugan* what it called "the general rule." That statement is a misleading summary of what the Court does and will do. After quoting first from *Land* and then from *Larson v. Domestic and Foreign Commerce Corporation*[12], the Court then declared:

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself upon the public treasury or domain, or interfere with the public administration, . . . or if the effect of the judgment would be 'to restrain the government from acting or compel it to act."[13]

This asserted general rule has never been the general rule. Judgments of this Court have often "expended themselves on the public treasury or domain,"[14] have often "interfered with the public administration,"[15]

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[12] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

[13] 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963).

[14] In *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), this Court upheld a writ of ejectment against government officers who held possession of land on behalf of the government. The effect of the Court's order was to oust the government from land. The judgment expended itself on what the government claimed to be the public domain. The government was restrained from staying, and was compelled to get off.

[15] In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959), the question was "the validity of the government's revocation of security clearance granted to the petitioner, an aeronautical engineer employed by a private manufacturer which produced goods for the armed services." The Court issued a declaratory judgment that the government's revocation of the security clearance was unlawful. The effect of the declaration was to "interfere with the public administration" and "compel the government to act" to withdraw the revocation.

and have often "restrained the government from acting or compelled it to act."[16]

Kenneth Culp Davis summarized what is happening "in our strange system" in the following language:

> When you sue the government for specific relief or for a declaratory judgment, you must falsely pretend (in the absence of a special statute) that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know that the relief is against the sovereign. Even when the substance of sovereign immunity is gone, the form usually remains. The courts do not violate the doctrine of sovereign immunity except in substance.
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> * * *
>
> The transition stage during which the courts

[16] In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed. 2d 639, (1962), this Court reversed a denial of injunctive relief against the Post Office Department's refusal to carry certain mail. The effect was to compel the United States to carry the particular mail. The Court's decree "interfered with the public administration," and "compelled the government to act." In *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed. 2nd 1012 (1959), the Court ordered the Secretary of the Interior to reinstate a federal employee to his government position. Surely in every realistic sense the Court's judgment "expended itself against the government," and "compelled the government to act." The Court's judgment required the government to take the employee back, to allow him to work as a government employee, and to pay him his salary.

> are in the process of unmaking the judicially made law of soveregin immunity, causes the judges to grant relief against the sovereign but to deny that they can grant relief against the sovereign. They can do justice but they have to pretend that sovereign immunity prevents them from doing justice. They must hide the truth. Judge X hides the truth from Judge Y who hides the truth from Judge Z, who hides the truth from Judge X. The litigants hide the truth from the judges, and the judges hide the truth from the litigants.
>
> The time is surely approaching, perhaps the time has come, for relinquishing the false pretenses. The courts are allowing the doctrine of sovereign immunity to be violated in substance, and the time is coming, perhaps soon, when the forms of sovereign immunity will seem useless.[17]

This Court has also acknowledged and responded to the growing disfavor of the sovereign immunity defense. In the case of *National City Bank of New York v. Republic of China*,[18] this Court observed:

> But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady drift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as "Public opinion as

[17] Davis, *Administrative Law Treatise* Vol. 3 (1965 Pocket Supplement) pp. 151-152.

[18] 348 U.S. 356, 359, 75 S.Ct. 423, 426, 99 L.Ed. 389 (1955).

to the peculiar rights and preferences due to the sovereign has changed," *Davis v. Pringle*, 268 U.S. 315, 318; "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . ." *White v. Mechanics Securities Corp.*, 269 U.S. 283, 301; ". . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . .", *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797. At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due from the sovereign. And because of the objections to *ad hoc* legislation allowances of private causes, Congress a hundred years ago created the Court of Claims, where the United States, like any other obliger, may affirmatively be held to its undertakings. This amenability to suit has become as commonplace in regard to the various agencies which carry out "the enlarged scope of government in economic affairs," *Keifer & Keifer v. Reconstruction Finance Corp.*, *supra*, at 390. The substantive sweep of amenability to judicial process has likewise grown apace.

The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy properly makes demands on the judicial process.

This Court's acknowledgement that its decisions in this area cannot be reconciled gives the Court an opportunity, indeed a duty, to clarify the law in a sound manner. To do so the Court need not break new ground. It needs only to adhere to the simple and sound observation it made in 1882: "Courts of Justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights and controversy between them and the government."[19]

II

The McCarran Amendment Was Enacted to Allow Joinder of All Water Users in Proper Adjudication Procedures.

Under the laws of the Western States, procedures exist whereby water users or state officials can initiate judicial proceedings to obtain a determination of the respective water rights of water users on a particular river or other water system. Due to the priority concept of the appropriation doctrine, if any such general adjudication of water rights is to be effective, it is imperative that *all* water users from a single source of supply be joined in the action and bound by the results.

Unfortunately, prior to the enactment of the McCarran Amendment,[20] this was not possible. The United States, because of sovereign immunity, could not be joined in such adjudications. Since the United

[19] *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 261, 27 L.Ed. 171 (1882).

[20] The McCarran Amendment (43 U.S.C. 666, Act of July 10, 1952, 66 Stat. 560), construction of which is at issue here, provides in pertinent part: "Suits for adjudication of water

States claims the right to initiate unknown, uncatalogued and undetermined future uses on National Forest lands under priority dates ranging from 1897 to 1903, other water users had no assurance or security that their current water supply would remain intact. This left the predictability of future water supplies in an unstable and intolerably confused state. In addition to potential deprivation of existing users, possible developers refused to make the substantial investments necessary to beneficially utilize water resources for fear of losing their water rights as a result of the Federal Government subsequently asserting claims to the water.

The legislative history of the McCarran Amendment clearly indicates that it was enacted because of this problem and to allow effective determination of all

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rights. (a) Joinder of United States as defendant; costs. Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit shall (1) be deemed to waive any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, that no judgment for costs shall be entered against the United States in any such suit."

water rights. In its report, the Senate Judiciary Committee states:[21]

> In the administration of and the adjudication of water rights under state laws, the state courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, *and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.* Accordingly *all* water users on the stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a state court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts.

The absolute necessity of joining the United States to achieve effective adjudication of water rights was reiterated later in the report:[22]

> Since it is clear that the states have the control of the water in their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper ad-

[21] (See Senate Calendar No. 711, Report No. 755, September 17, 1951 quoted in Vol. 98, Part I, Congressional Record — Senate, 82nd Cong. 2d Sess., pp. 120-122, January 14, 1952)

[22] *Ibid.*

> ministration of the water law as it has developed over the years. . . .
>
> The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the court in the same manner as if it were a private individual.

In discussion of the Act on the Senate floor, Senator Arthur V. Watkins, (Utah), who was subsequently designated as a co-sponsor of the measure, illustrated the bill's purpose:[23]

> Senator Watkins. I would like to give you one illustration, which illustrates very well what we are trying to do.
>
> The Jordan drainage area in Utah has, with the United States acting as a trustee for one of the great reclamation projects and holding title to a certain amount of water out of the stream, a suit to determine the rights of all the water users on that stream now in court. The only one that is not in there is the United States as trustee, and we cannot get them into court because we do not have a bill such as S.18 passed.
>
> The United States has not consented to come in and be sued. How are we going to determine those rights? We would like to get the matter settled.
>
> In that particular case, the United States owns property along the stream, yet we cannot get our

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[23] Vol. 98 Part Three, Congressional Record — Senate, 82nd Cong. 2d Sess., p. 3042.

rights determined because we cannot get into court.

Now, that is what we would like to be able to do out in the West.

Finally, the Department of Interior acknowledged that:[24]

> The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of the *United States v. Winters* (207 U.S. 546 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under [a series of specified acts]; those with respect to which its officers and employees have followed the procedure prescribed in Section 8 of the Act of June 17, 1902 (32 Statutes 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation by private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all of these types, it is clear to me

[24] Letter from Mastin G. White, Acting Assistant Secretary of the Interior, to Pat McCarran, Chairman of the Committee on the Judiciary, Aug. 3, 1951.

> that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

These observations concerning the scope of the Bill were not denied, nor were any changes made in the statutory language in response to them.

In summary, it seems indisputable that the purpose of the McCarran Amendment was to make possible an effective determination of all water rights from a single source of supply. Under any other interpretation, the probability remains that any decree determining priorities and extent of rights will be overturned. This instability in water rights adjudication was the very evil the measure was designed to eliminate.

The United States urges this Court to construe the McCarran Amendment to preclude proper adjudication of all water rights. It argues that the prepositional phrases referring to modes of acquisition — that is, (a) "by appropriation under state law," (b) "by purchase," (c) "by exchange," and (d) "or otherwise," — modify and qualify the phrase "the owner of." So construed, federal ownership alone is not sufficient ground to justify joinder of the United States in a water adjudication suit. Rather, on this view, the United States may be joined only if it acquired the pertinent water rights by one of the specified modes

of acquisition. They claim that reserved water rights have not been acquired by means of "appropriation," "purchase" or "exchange," which are modes of acquisition under state law, and that the rule of *ejusdem generis* limits the denotation of "or otherwise" only to other means of acquisition under state law. Inasmuch as reserved water rights are not acquired pursuant to state laws, the government argues, the Act does not authorize joinder of the United States in water rights adjudications concerning reserved rights. Whatever technical merits this interpretation may have, it is clearly erroneous. Such an interpretation frustrates the stated purpose of the McCarran Amendment, perpetuating the very evil it was designed to correct.

The statutory language is susceptible of a different, more reasonable interpretation which implements the purposes of the Act. The phrase "the owner of" should be accorded general application and *not* be qualified by the phrases referring to the specified modes of acquisition.

Thus construed, the statute would be read as follows:

> Consent is given to join the United States as a defendant in any suit where it appears that the United States [1] is the owner of [water rights] or [2] is in the process of acquiring water rights by [a] appropriations under state law, [b] by purchase, [c], by exchange, or [d] or otherwise.

This interpretation is supported by the doctrine of the "last antecedent" which holds that relative and

qualifying words, phrases, and clauses are to be applied to the words or phrase *immediately* preceding, and are not to be construed as extending to or including others more remote.[25] Under this rule, phrases [a], [b], [c], and [d] are applied only to the immediately preceding phrase: "is in the process of acquiring water rights" and *not* to the more remote phrase "the owner of." This interpretation would allow joinder of the United States in water rights adjudication on the basis of ownership alone regardless of the source of that ownership.

The same result can be achieved by rejecting the government's application of the rule of *ejusdem generis* to the phrase "or otherwise." The government's argument that this phrase must be limited to modes of water rights acquisition under state law is not well founded in that "purchase" and "exchange" are *not* peculiarly modes of acquisition *under state law* as is appropriation. In fact, the United States has previously claimed that "when the United States acquired ownership of the public domain by cession from foreign sovereigns, it acquired the rights to use waters thereon within the bundle of rights which ownership of the lands involves."[26] For the most part, those "cessions"

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[25] 82 C.J.S., Statutes, 334.

[26] Nicholas de B. Katzenbach, Deputy Attorney General, "Memorandum re: S.1275," Hearings before the Subcommittee on Irrigation and Reclamation of the Interior and Insular Affairs, U.S. Senate, on S.1275, p. 11 (1964). cf., *Brief for the United States* 20. The validity of this claim is strongly disputed by the States, but is not before the Court at this time. See p. ...., *supra*.

upon which the reserved rights are based were "purchases." Surely, if the United States were to "exchange" public lands for lands on an Indian reservation, it would not relinquish whatever water rights those Indian lands might have. In neither example were the rights in question acquired "under state law."

To accept the interpretation of the United States would render the phrases "by purchase" and "by exchange" meaningless, inasmuch as, according to the United States, these terms are included in "by appropriation under state law." Such a construction would violate the presumption that the legislature intends that each word in a statute should have some meaning all its own, and is included in the statute for a particular purpose. Thus, it seems more reasonable that [a], [b], and [c] be construed as members of the general class of modes of water rights acquisition with [d] "or otherwise" serving to complete or exhaust that class. So construed, the Act would extend to adjudication of all types of federal water rights.

It seems apparent that the language in question is amenable to more than one interpretation and hence must be given that which will best effect its purpose rather than one which would defeat it.[27] As this Court has often held in construing a statute, to give effect to the intent or purpose of the legislature, the Court must look to the object to be accomplished and/or the evil or

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[27] *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787, rehearing denied 335 U.S. 835, 69 S.Ct. 9, 93 L.Ed. 388.

mischief sought to be remedied.[25] The McCarran Amendment was enacted to allow an effective determination of water rights and to eliminate uncertainty and confusion as to the existence and extent of one's water rights.

The anomalous consequences of the government's construction of the Act focus attention on a fundamental inconsistency in the government's position. On the one hand, the government resists the jurisdiction of the Colorado District Court on the grounds that the action is not a *general* adjudication of *all* purported water rights on an entire river system. The United States, it urges, may not be subjected to piecemeal litigation in the resolution of its water rights. But in the next breath, the government argues that the McCarran Amendment should be construed to allow determination of only federal appropriative rights and not federal reserved rights, thus precluding the possibility of a completely general adjudication.

III

Adherence to the Appropriative Doctrine of Water Rights Forms the Basis for the Economic Stability of the West.

Submission of federal uses of water on reserved lands to the jurisdiction of state courts would not

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[25] *U.S. v. Bryan*, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884, rehearing denied 339 U.S. 991, 70 S.Ct. 1018, 94 L.Ed. 1391. In ascertaining the intent and purpose, the court must look to the purpose to be subserved by the statute and should place such construction as will, if possible, effect the purpose of the statute. (*U.S. v. Cooper Corporation*, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071).

"frustrate" "the purposes for which millions of acres of lands have been withdrawn from the public domain," or make the "reserved rights of the United States . . . vulnerable to the vagaries of inconsistent state laws."

The water laws of the various Western States are not "vague" or "inconsistent." While there may be minor differences in some of the states, much of the law is now statutory, and is fairly uniformly construed. All the Western States, either by constitution, statute, or judicial pronouncement, adhere to the tenet of "beneficial use," which is the limit and measure of the right.

As Mr. Justice Douglas stated, the doctrine is "as important to these Western States as the doctrine of seizin has been to the development of Anglo-American property law."[29]

Frank J. Trelease, Dean of the Wyoming Law School, aptly described the appropriative doctrine in this manner:[30]

> Upon it much of the wealth of the West has been built. Mining was its origin, irrigation has been its mainstay, but appropriations are made for all beneficial purposes: domestic and municipal, manufacturing and power production, stock raising and public recreation.

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[29] *Arizona v. California*, 373 U.S. 546, 629 (1963)

[30] Trelease, *Arizona v. California, Allocation of Water Resources to People, States and Nation*, The Supreme Court Review, 1963) p. 158.

Several features combine to make an appropriation a property right of a high order. An appropriation is always defined in terms of the right to take a specific quantity of water. This, coupled with the element of priority, gives the western appropriators right a unique stability. On a typical western stream where there are many irrigators with water rights initiated at different times, all may draw water while the mountain snowpacks melt and the stream is high. As the stream flow decreases during the dry summer, the diversion works of appropriators are shut off in inverse order of priority. The burden of shortage thus falls on those with the later rights; there is no proration in times of scarcity. Some observers have questioned the desirability of this rule. Yet in its unique fashion it has led to maximization of benefits. The westerners early saw that an equal share of water that was insufficient for all might lead to parceling out the waters in shares that were sufficient for none. The rule of priority is not as harsh as it sounds. It guarantees a firm supply to all those for whom the supply is sufficient, and these people have been able to build an agriculture unmatched in stability in places where dependence is placed on natural rainfall. The junior appropriator is encouraged by this law to develop water resources. Instead of competing for a share of the available riparian system, the later users are forced to spend money to develop water from alternate sources. When senior appropriators had taken all of the dependable flow of western streams, further development was inaugurated by juniors who built dams to store spring floods, built larger dams that would store the supply of good years against future droughts, or brought water

> long distances across or through mountain ranges from basins where the supply exceeded the local demands. The junior appropriator who does face a risk of shortage is like a farmer in a sub-humid area who must take his chances on rain. The value of his enterprise and the worthwhileness of venturing into it will depend upon the forecast he can make of receiving a supply. If the risk is great, he may use the land almost as dry land, so that water, when it comes, is a bonus. The senior appropriator with a firm water right may grow an orchard; the junior would not risk so substantial an investment in time and money. He might gamble on the loss of an annual crop but not of a permanent investment.

So long as potential federal developers can retain the priority date of the original federal reservation without identifying the amounts needed to effectuate the original purposes of the reservation, the necessary accuracy in appraisal of water supply is not possible.[31] The resulting uncertainty stymies state and private development and bars optimum utilization of the West's most precious resources.

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[31] A revealing instance of the kind of problems that have been generated and aggravated by the government's position concerns the proposed Pine Hollow Reservoir Project in Oregon. In a letter to the Regional Director, Bureau of Outdoor Recreation, Seattle, Washington, under the date of October 24, 1968, from LeonJourolmon, Assistant Regional Solicitor, the following was stated: "The Pine Hollow Cooperative, Inc., is planning to build the Pine Hollow Reservoir on land roughly three-fourths of a mile outside the boundaries of the Mount Hood National Forest. The reservoir impoundment will involve largely waters which arise on or flow from the lands in the Mount Hood National Forest. As you may be

The Western States do not wish to "destroy" the productivity of the millions of acres of reserved lands. They only wish to be afforded a procedure by which those rights can be identified. Their good faith is exemplified in a Position Paper submitted to the Public Land Law Review Commission in which they unanimously urged that Commission to recommend legislation which requires the United States:

> to identify all Federal claims to surface and underground water asserted under the Reservation Doctrine or other theory of paramount right including those made on behalf of Indians. Such

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aware, the Federal Government may assert its federally derived right to the use of water on federal lands by reference to Supreme Court decisions holding that waters traversing or bounding a reservation are reserved by the legislation or executive order establishing the reservation or withdrawal of public land. [Citing cases] Thus there is a serious question present as to whether or not Pine Hollow Cooperative, Inc., will be able to appropriate under Oregon State Water Law Procedures any water rights which can be regarded as binding upon the United States with respect to the waters flowing out of the Mount Hood National Forest. It is my opinion that the Cooperative will not be able to secure water rights under its application to the Oregon State Engineer for the 1,200 acre foot minimum sump together with the additional capacity of 3,500 acre feet for irrigation purposes together with 15 CFS out of Badger Creek for filling and maintenance, which rights can be regarded as valid and binding upon the United States as to the water flowing out of the Mount Hood National Forest. In these circumstances, it is also my opinion that the Cooperative will not be able to assign to the Oregon State Game Commission the rights to the 1,200 acre feet sump that can be regarded as free from doubt as to warrant assistance to the proposed participant of funds from the L&WCF for this project."

identification should include a specific recital of the purpose, location, extent and priority date of every water right claimed. The United States should be required to complete such identification within a reasonable, specified period of time and should be required to give notice to each affected state. The legislation should limit such claims to the effectuation of the original purpose of the reservation.

There is nothing in the present law or prior appropriation that would preclude a state court from reaching the same reasonable result. They should at least be given a chance to try.

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted:

DUKE W. DUNBAR,
Attorney General
State of Colorado

ROBERT M. ROBSON,
Attorney General
State of Idaho

LEE JOHNSON,
Attorney General
State of Oregon

ROBERT L. WOODAHL,
Attorney General
State of Montana

HARVEY DICKERSON,
Attorney General
State of Nevada

G. KENT EDWARDS,
Attorney General
State of Alaska

APPENDIX A

WATER USES ON PUBLIC LANDS*

(in acre feet)

	LIVESTOCK			BIG GAME			RECREATION		
	1967	1980	2000	1967	1980	2000	1967	1980	200
BLM	12,450	18,411	25,546	1,222	1,370	1,674	169	242	
Forest Serv.	69,752	96,531	125,061	20,769	23,696	24,387	49,909	35,751	72,91
Nat'l. Park Service	330	297	249	98	98	98	1,029	3,560	5,33
Fish & Wildlife	568	578	611	69	72	76	45	116	19
USBR	277	290	310	29	33	30	278	790	1,27
AEC									
NASA									
ARS	404	517	427						
Army									
Air Force									
Navy									
Corps of Eng.							5,922	17,292	26,93
	83,781	116,624	152,204	22,187	25,269	26,265	57,352	57,751	106,61

*Compiled from information supplied by the various federal agencies to the Public Land Law Review Commission and utilized by Thomas M. Stetson, and Daniel J. Reid in their "Study of the Development, Management, and Use of Water Resources on the Public Lands," prepared for that Commission.

LAND OCCUPANCY			OTHER			TOTAL		
1967	1980	2000	1967	1980	2000	1967	1980	2000
						13,814	20,023	27,220
20,955	26,376	32,090	17,466	18,435	26,017	178,851	200,789	280,468
447	1,049	1,576	426	686	1,032	2,330	5,690	8,294
17	20	29	1,988,422	2,159,558	2,202,946	1,989,121	2,160,344	2,203,850
1,333	569	751	1,115	1,792	2,244	3,032	3,474	4,572
2,789	2,789	2,789				2,789	2,789	2,789
124	149	155				124	149	155
32	32	32	8,053	8,887	8,886	8,489	9,436	9,345
30,350	30,350	30,350				30,350	30,350	30,350
6,513	6,513	6,513	1,627	1,627	1,627	8,140	8,140	8,140
10,060	12,276	15,344				10,060	12,276	15,344
625	847	1,006	2,140	670	670	8,687	18,809	28,609
73,245	80,970	90,635	2,019,249	2,191,655	2,243,422	2,255,814	2,472,269	2,619,136

APPENDIX B

RESPONSES TO NATIONAL WATER COMMISSION

In the Summer and Fall of 1969, the National Water Commission held a series of hearings "to learn what the public thought about the water situation in the United States."[1] To indicate the general nature of subjects to be discussed, the Commission circulated a list of twenty-five questions. State responses indicated their interest in the MacCarran Amendment and state-federal relations in general.

The National Water Commission asked:[2]

> In what way does present law regarding the ownership of water rights encourage or discourage wise use of water? Should changes be made in laws governing federally-owned water rights?

The Western States responded:[3]

California

California has consistently urged that Congress clarify the respective interests of the United States and the states in the use in certain streams. This is a reaction to a series of United States Supreme Court decisions which have been adverse to state water rights by holding that on withdrawn or reserved lands, water rights created by state law are subject to federal uses on such land. Thus, state-created water rights subsequent to the reservation of public lands are subordinate to the reserved water rights, and no compensation need be paid by the Federal Government when use of the reserved water right results in an interference (taking) of a state-created water right.

* * *

The cases recognize a priority in favor of the water rights of these reservations, related to the date of their establishment.

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[1]The National Water Commission, Interim Report No. 1: Annual Report for 1969, p. 5.

[2]Id at 40.

[3]The National Water Commission circulated a list of 25 questions and 31 tentative programs of studies. Arizona, Colorado, Idaho and Washington commented on the studies, but did not respond specifically to the 25 questions.

But the quantity of the right is not established unless and until that water right is litigated, usually many years after creation of the reservation. When the magnitude of the water right is finally determined, as it was in *Arizona v. California,* the quantity may be fixed by a determination of the reasonable requirements of the reservation, but this determination (at least in the case cited) has been controlled by the standards of physical and economic feasibility prevailing at the time of the decision, not those which existed at the time when the reservation was created. In the interval between establishment of the reservation and the determination of the quantity of its water rights (this interval may amount to several decades), uses may have been built up under state law appropriations, or conceivably under federal authorizations. These are cut off, without compensation, to the extent of their conflicts with the water right subsequently "quantified" for that reservation in a court decree, which relates the right to that quantity back to the date of creation of the reservation. It would seem only fair that the quantity of the right should be established at the time of the creation of the right, as is required by state appropriation laws.

* * *

It seems to many of us that Congress, in the Reclamation Act of 1902 and supplementary legislation, recognized a sound principle when it directed the Secretary of the Interior to acquire water rights for federal projects in compliance with state law, whether those rights are initiated by appropriation or are acquired from prior appropriators. The Supreme Court in *Arizona v. California* recognized the power of Congress to create water rights by authorizing the impounding and disposition of waters not previously appropriated, and to do so without compliance with state law. There have been, and will be again, cases in which this is necessary. But I believe that the Commission should recommend that, in the absence of specific congressional directions to the contrary, the Federal Government should initiate or acquire water rights (at least consumptive use rights) in accordance with, and not by supersedure of, the laws of the state in which the water is diverted or impounded.

Montana

The State of Montana, together with most western states, has been greatly disturbed by the constant contention of the

Department of Justice that the United States is the actual owner of all the waters in all of the western streams, and that the Federal Government, therefor, is supreme and may ignore the laws of the various states. We, therefore, firmly support the inherent right and obligation of the people, with or without assistance from the Federal Government, to develop their water resources and to protect their right to continued use within the framework of applicable interstate compacts and the water laws of the respective states. We feel that this is of utmost importance and one which will have to be given an in-depth study by your Commission with the hope that your leadership may help to resolve this extremely important problem.

Nevada

In our view one of the most critical problems is a resolution of the jurisdictional question regarding authority for administering water rights and water supplies originating on, over or beneath the public lands. This issue has been the subject of much controversy and investigation, including review by the Public Land Law Review Commission. The seriousness of the problem has been minimized by those who for one reason or another object to appropriate federal legislation to clarify the issue. We urge you to not pass lightly over this matter on the grounds that no material damage or adverse results have occurred because of this unresolved question. I think this is analogous to the very real and practical problem that we all face in the determination and assignment of benefits to such factors as aesthetics and environment in consideration of water development projects. The damage or adverse affects from the unresolved jurisdictional question may be difficult to quantify in dollars and cents. However, the "cloud" of the reservation doctrine and the ever-present effort by some to extend the interpretation of the reservation doctrine is in a sense an open ended demand which thwarts development of our resource water. To our knowledge all past attempts to resolve this issue through proposed legislation have been restricted to surface water supplies. Because the ground water resource will become more significant in meeting our future demands, this source and all sources of supply should be specified in any action to clarify the question.

New Mexico

New Mexico's water law, as it applies to both underground and surface sources, is based on the doctrine of prior appropriation. Rights to the use of water are based on beneficial use and priority in time of appropriation gives the better right. All of the waters of the State belong to the public, and are subject to appropriation in accordance with law under the supervision of the State Engineer. Under the established juridical system, wise use is encouraged and waste is discouraged. Our statutes permit the change of point of diversion and place and purpose of use of water rights with the consent of the owner. Thus, economic competition which tends to move water to the currently highest economic use is allowed.

We concede the virtue and validity of an overlapping system of State and Federal jurisdiction and authority. However, it is out of this dual sovereignty that some confusion arises. Much of this uncertainty derives from the assertion of Reservation Doctrine claims by the United States. Under this doctrine, the United States claims all the water needed for the purpose of the reservation with the priority of the date of creation of the reservation.

We cite here, in the broadest terms, areas of potential legislative change, designed to bring about a more favorable climate for furtherance of both state and federal goals in water resources planning and development. First, there should be a way to quantify the Reservation Doctrine claims of the United States. There should be legislation which would require federal agencies to inventory present water uses and claims of right to the use of water for a specified time into the future. Such legislation should include provisions making such claims binding upon the United States by the establishment of a procedure for settling of those claims. It is important for planners at the state, local and private levels and for the federal government itself, that such claims be identified as to quantity and priority and geographic location.

In addition to the inventory and procedures for definition discussed above, it is desirable that there be a liberalization of the so-called McCarran Amendment (43 U.S.C. Section 666) to clarify the entitlement of the states, or subdivisions thereof,

to secure judicial clarification of the nature and extent of all federal water rights claimed including Indian rights.

Oregon

One of the major questions in the legal area in the western states is the lack of clarification of state-federal jurisdiction over water. Primary attention has been focused on the impact of this on irrigation, but in Oregon, at least, most of our cities and major water-using industries utilize water that arises from or flows over federal lands. This matter has been the subject of extensive hearings before Congressional committees and of numerous court cases without, at the moment, satisfactory resolution. We believe this particular matter is worthy of the Commission's attention and hopefully leadership in resolution of the problem.

Utah

There is a long-standing controversy regarding the role of the Federal and State Governments in the field of water rights. We believe the Commission should address itself to this problem and with the help of the federal agencies and the states, seek to outline a means by which this long-standing problem can be resolved in a manner that protects the rights of all of our citizens. Unless this is resolved in the near future, a major crisis in state-federal relations is likely to arise within a few years.

Wyoming

One of the most important problems facing the Western States today relates to the so-called "Reservation Doctrine," and the related question of jurisdiction over water use and water rights. The Public Land Law Review Commission is studying the problem in depth, and hence it may not be necessary to comment in detail. We feel that federal claims of reservation of unlimited quantities of water for use on federal reservations, with a priority as of the date of the reservation, create a cloud over state-granted water rights which is intolerable. Such unquantified reservations would limit future development and discourage investment in water projects. National Forest Reserves in Wyoming cover most of the high

water-producing areas, and these forests were reserved prior to many of our state-granted water rights. The potential impact of the Reservation Doctrine on our State is significant. At its extreme it could seriously damage existing water users, and as a minimum, it creates a cloud over future water development which needs to be removed.

Jurisdiction over water resources and the authority to issue rights for the use of water must be clearly established if we hope to maintain an orderly system of water administration. Dual jurisdiction simply cannot work. The states have traditionally accepted and fulfilled this responsibility and there does not appear to be sufficient reason to modify this arrangement.

The National Water Commission would appear to be an appropriate entity to study this question. Even though the Public Land Law Review Commission is expected to make its recommendations within a year, the non-governmental orientation of your Commission may well indicate the possibility of a different conclusion being reached. The question is of sufficient importance to justify a serious effort to resolve the problem before it becomes more acute.

APPENDIX C

THE TREND TOWARD SOVEREIGN RESPONSIBILITY

Florida

The modern movement in State Courts away from sovereign immunity and toward sovereign responsibility began in Florida in 1957 when the Florida Supreme Court held a municipality liable for the wrongful death of a jailed inmate who was suffocated by smoke, stating:

> [O]ur own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated. The problem in Florida has become more confusing because of an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside as we should any other archaic and outmoded concept. . . . The great body of our laws is the product of progressive thinking which attune traditional concepts to the needs and demands of changing times. The modern city is a substantial measure of large business institution. . . . To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the 20th century upon an 18th century anachronism. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 60 A.L.R. 2d 1193 (Fla. 1957).

Colorado

The Colorado court declared: "sovereign immunity may be a proper subject for discussion by students of mythology. It finds no haven or refuge in this court." *Colorado Racing Commission v. Brush Racing Association*, 136 Colo. 279, 284; 316 P.2d, 582, 585, (1957). Later the court said: "The doctrine of sovereignty in Colorado is in limbo, only the memory lingers on." *Stone v. Currigan*, 138 Colo. 442, 448; 334 P.2d. 740, 743, (1959). Subsequently the court by a four to three decision held that the immunity doctrine had to be followed. *City and County of Denver v. Madison*, 142 Colo. 1, 351 P.2d 826, (1960).

Illinois

The Illinois Supreme Court elaborately discussed reasons for sovereign immunity and announced:

> We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reasons, and has no rightful place in modern day society. . . . Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. . . . We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to over-rule those decisions and establish a rule consonant with our present day concepts of right and justice. *Monitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, 163 N.E. 2d 89, 86 A.L.R. 2d 469 (1959) certiorari denied 362 U.S. 968, 80 S. Ct. 955, 4 L.Ed. 2d 900 (1960).

New Jersey

The New Jersey Court eliminated a large chunk of sovereign immunity when the court rejected the argument that a change in the law should be left to the legislature: "Surely it cannot be urged successfully that an outmoded, inequitable, and artificial curtailment of the general rule of action created by the judicial branch of the government cannot or should not be removed by its creator. . . . [J]udicial and not legislative action closed the court doors, and the same hand can, and, in proper circumstances should, reopen them." *MacAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820, 88 A.L.R. 2d 313 (1960).

Minnesota

A unanimous Minnesota court repudiated the doctrine of sovereign immunity, stating: "Since we have repeatedly proclaimed that this defense is based on neither justice nor reason, the time is now at hand when corrective measures

should be taken by either legislative or judicial fiat." 264 Minn. at page 285, 118 N.W. 2d at page 799. The court declared: "Even in jurisdictions which adhere to the immunity doctrine, seldom is any justification advanced beyond the rule of *stare decisis*. Our considerations of the origins of tort immunity persuade us that its genesis was accidental and was characterized by expediency, and that its continuation has stemmed from inertia." *Spaniel v. Mounds View School District*, 264 Minn. 279, 281, 118 N.W. 2d 795, 796 (1962).

Wisconsin

The Wisconsin court unanimously abolished sovereign immunity for tort liability and supported with many quotations its statement that: "There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine." 17 Wis. 2d at page 33, 115 N.W. 2d at page 621. The court found that "it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective amendments," announcing that "hence forward . . . the rule is liability — the exception is immunity." *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W. 2d 618, 625 (1962).

California

Justice Traynor traced the history of sovereign immunity and declared:

> The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . . None of the reasons for its continuance can withstand analysis. . . . It has become riddled with exceptions . . . and the exceptions operate so illogically as to cause serious inequality.

To the argument that the legislature, not the court, should remove the immunity, the Court responded that the doctrine was court-made, that the legislature had enacted various statutes waiving immunity in some areas, and that the various statutes "leave the court whether it should adhere to its own rule of immunity in other areas." *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

Michigan

The Michigan court announced:

> From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. In this case, we over-rule preceding court-made law to the contrary. We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong. *Williams v. City of Detroit* 364 Mich. 231, 250, 111 N.W. 2d 1, 20 (1961).

Arizona

In 1963, the Arizona court declared: "We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be disregarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled." *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963).